



[2017] JMSC Civ 119

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014HCV03483

BETWEEN	CALVERN GAVIN	APPLICANT
AND	LAURETTA GAVIN	RESPONDENT

IN CHAMBERS

Mr Sean Kinghorn instructed by Kinghorn and Kinghorn for the Applicant

Mr Lawton Heywood instructed by HeywoodBlake for the Respondent

HEARD: June 20, 2017 and September 14, 2017

Property (Rights of Spouses) Act **Fixed Date Claim Form filed and served-**
Application for extension of time to file FDCF- Application for leave to make
application out of time

LINDO J.

[1] The parties in this matter were married on March 24, 1984. During the course of the marriage, on or about August 24, 1995 they acquired property at Church Road in Bog Walk, Saint Catherine and resided there as husband and wife. In February 2007 they were divorced.

- [2] It is the dissolution of the marriage which would entitle Mr Gavin, the Applicant, to make an application for the court to determine his interest in the property. Pursuant to Section 13(2) of The Property (Rights of Spouses) Act (PROSA), he would have had to file his application by February 2008.
- [3] On July 18, 2014 the Applicant filed a Fixed Date Claim Form supported by an Affidavit by which he sought, *inter alia*, declarations that “all that parcel of land situated at Church Road, Bog Walk measuring 1 ½ square chains being all that Parcel of land contained in Deed of Conveyance dated the 24th August 1995 and recorded at the Registrar’s (sic) General (sic) Office at LNS 4822 Folio 213 is the family home of the Applicant and the Respondent under and by virtue of the provisions of the Property (Rights of Spouses) Act” and that the applicant is entitled to “a one half legal and equitable share...”
- [4] The matter was proceeding in the court and was set for trial on February 23 and 24, 2016. On January 4, 2016, the Applicant filed a Notice of Application for Court orders seeking, *inter alia*, an extension of time to July 18, 2014, to pursue the claim under Section 13 of PROSA and an order that the FDCF filed on July 18, 2014 be permitted to stand and on February 17, 2016 he filed an Amended Notice of Application for court orders to include the following: “That leave be granted to the Applicant to make an application under PROSA out of time”.
- [5] On June 20, 2017, when the application came on for hearing, I heard the submissions of Counsel and adjourned the matter for consideration. All the evidence adduced by the parties as well as the submissions of Counsel in support of, and in opposition to the application have been duly considered by me and I do not propose to recite the details in this judgment.
- [6] The Applicant placed reliance on the decision of Edwards J. in **Diedre Anne Hart Chang v Leslie Chang**, Claim No. 2010HCV03675, unreported, delivered November 22, 2011, while the Respondent relied on the cases of **Delkie Allen v**

Trevor Mesquita, [2011]JMCA Civ 36 and **Peter Haddad v Donald Silvera**, SCCA No. 31 of 2003.

[7] Section 13 of PROSA reads as follows:

“13.- (1) A spouse shall be entitled to apply to the Court for a division of property-

*(a) on the grant of a decree of dissolution of a marriage or termination of cohabitation;
or*

(b) ...

*(c) where a husband and wife have separated and there is no reasonable
likelihood of reconciliation;*

(d) ...

(2) An application under subsection (1) (a), (b) or(c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation...or separation or such longer period as the Court may allow after hearing the applicant.”

[8] There is no dispute that the parties were married and that the marriage ended in divorce in February, 2007 and that the application for declaration as to his entitlement to the property is out of time.

[9] The issues which I find arise for my consideration are therefore whether the Fixed date claim form is valid, having been filed outside the twelve (12) month period stated in Section 13(2) of PROSA, and whether leave, together with an order for extension of time is required prior to the filing of a claim for relief out of time under PROSA. The court also needs to consider whether the instant case is a fit one in which the court should exercise its discretion to extend time.

[10] In the case of *Chang v Chang*, supra,

[11] In **Brown v Brown** [2010] JMCA Civ 12, Morrison JA (as he then was) said at [77]:

“On an application under section 13(2),it seems to me, that all the judge is required to consider is whether it would be fair (particularly to the proposed defendant, but also to the proposed claimant) to allow

the application to be made out of time, taking into account the usual factors relevant to the exercise of a discretion of this sort, such as merits of the case (on a purely prima facie basis), delay and prejudice, also taking into account the overriding objective of the Civil Procedure Rules of 'enabling the court to deal with matters justly' (rule 1.1(1)).

[12] In the case of **Allen v Mesquita**, (*supra*) Harris JA held at [18] that:

"The court, in exercising its discretion for an extension of time, is required to take into consideration such factors as the length of the delay, the reasons for the delay, whether an applicant has a claim worthy of a grant of an extension of time and the question of prejudice to the other party"

[13] In **Angela Bryan-Saddler v Samuel Oliver Saddler** [2013] JMCA Civ 11, the applicant filed the claim form in January 2007, and in June 2007 made an application for extension of time. In the consolidated appeals with the case of **Fitzgerald Hoilette v Valda Hoilette and Davian Hoilette**, Phillips JA, with whom Harris, P (Ag.) and Brooks, JA agreed, said at paragraph [46] of the judgment:

"the claim was not invalid, but irregular, and could not proceed if the order (to extend time ...) was not granted".

She concluded that leave was not required to apply for an extension of time.

[14] The learned Judge of Appeal indicated that Section 13 of PROSA is a procedural section which set out the process to access the Court and the remedies available and that as the provision of Section 13 is procedural, any irregularity can be remedied by a subsequent order in the interests of justice, particularly as the grant of the order is under the court's control through the exercise of its discretion.

[15] She stated that the claims in question could be considered to be irregular or "in a state of suspended validity", until the application for extension of time was granted and indicated that there are no express words used in PROSA requiring that leave be obtained and that there is no indication that the application for extension cannot be filed after the claim is filed, and the order granted "*nunc pro tunc...*"

- [16] In the instant case, on the Amended application filed on February 17, 2016, the Applicant is seeking the leave of the Court to make the application under PROSA out of time, an order for extension of time to the date of the filing of the FDCF, as well as an order that the FDCF already filed, be permitted to stand.
- [17] Applying the principles extracted from the cases of **Saddler and Hoilette**, a more recent decision than **Allen v Mesquita**, I find that the FDCF filed on July 18, 2014 by the Applicant, approximately nine years after the dissolution of his marriage to the Respondent, was valid, though irregular, and he would need an order of the court extending the time for filing it. In view of the said authority, I do not find that it is necessary for the Applicant to seek leave of the court to make the application.
- [18] In considering the application for extension of time, I have a duty to give effect to the overriding objective of ensuring that justice is done while applying the provisions of the enabling statute and the principles from the authorities. I have therefore had regard to factors such as the length of the delay, the reason(s) for the delay and the issue of prejudice to either party if the application is granted or refused. I have also considered whether the Applicant has a claim worthy of a grant of an extension of time.

Length of delay and reasons for the delay

- [19] It is well settled that where issues of limitation arise, and these are debatable, it is inappropriate or undesirable to attempt to decide them on interlocutory applications, except in the clearest of cases. The matter for the court to consider here is therefore when does time begin to run and whether the reasons put forward for the delay are plausible.
- [20] In the instant case the delay is approximately 9 years. This in my view is extremely inordinate. Reasons for the delay have been proffered by the Applicant and he has exhibited documents on which he seeks to rely. Some of these are documents he obtained on an application to the court for these to be provided. He indicates that he is now aware that he is outside of the twelve months stipulation referred to

in S13(2) of PROSA and only became aware in a pre-trial meeting with his attorneys. He states, *inter alia*, that “ to my mind there was never any dispute about the fact that this property was held jointly by the respondent and I...as far as I was concerned we did not need the intervention of the court to assist with the equal sharing up of the property”. The reasons put forward also included ignorance, lack of funds and his expectation that they would amicably resolve the issue.

[21] Mrs Gavin has filed affidavits in response to the Applicant’s claim and application. There was however no evidence put forward by her to negate the reasons proffered or to contradict those reasons, except for certain assertions which relate to the acquisition of a registered title to the property and whether documents were in fact signed by the Applicant.

[22] The issue of the length of the delay and the reasons therefor have been addressed by Counsel for both parties and it is conceded by Counsel for the Applicant that there has been a lengthy delay between the date of the granting of the decree absolute and the date of the filing of the FDCF. Counsel for the Respondent expressed the view that the explanation lacks credibility and invites a finding that no explanation for delay has been placed before the court.

[23] The importance of the applicant giving reasons for the delay in applying within the time was underscored by Harris JA in the case of **Allen v Mesquita**, *supra*. In that case the applicant did not advance any reasons for the delay. Harris JA said:

“the absence of a good reason is not in itself sufficient to justify a refusal of an application to extend time, however, some reason must be advanced”.

She noted that the reasons for a tardy application are fundamental in determining whether the applicant had explained the delay in not acting timeously.

[24] I have therefore looked at the conduct of the parties up to the making of the application and I note the fact that on the evidence presented by the Applicant, Counsel now on record for the applicant was not the attorney engaged in the

proceedings leading up to the grant of the decree absolute and that may have left him at a disadvantage in relation to the legal advice he may have received in relation to the question of entitlement to property. I also note that it has not been denied that there were discussions aimed at amicably resolving the issue of the distribution of the property and the “protracted attempt ...culminated at a meeting... in 2014...It was at that time it became clear that the court’s intervention was needed...”

[25] I therefore cannot agree with Counsel for the Respondent that the explanation offered by the Applicant lacks credibility. It is the opinion of this court that the reasons advanced by the claimant for the lengthy delay are plausible. This is especially so given the fact that he also explained that efforts were made to amicably resolve the issues and it was after filing the FDCF he had to seek an order of the court to access documents relating to the registration of the property.

The question of prejudice

[26] On the question of prejudice, I have considered the issue of the limitation period. I bear in mind the dictum of Lord Griffith in **Donovan v Gwentoy's Ltd.** [1990] 1 WLR 472 at paragraph 479A where he said:

“...the primary purpose of a limitation period is to protect a defendant from any injustices inherent in having to face a stale claim which he never expected to have to face...”

[27] I also bear in mind what Harris JA said in the case of **Allen**, at paragraph [26] that :

“A court, in deciding whether a limitation period should take effect, is under an obligation to consider the circumstances of the particular case, taking into account whether there is any good reason which would prevail against the statute operating.”

[28] The authorities show that the court will not grant an extension of time to file a claim where to do so may cause prejudice and that an applicant for extension of time

must show that there are substantial reasons why the other party should be deprived of the right to a defence of limitation.

[29] It is my view that the delay in making the claim would of itself cause prejudice as the Respondent would be deprived of the right to limitation given by law. There is, however, no evidence that this delay, which I find to be quite inordinate, has prejudiced the Respondent in any way and she has not provided any evidence of prejudice or likelihood of prejudice due to the Applicant's delay.

[30] I agree with the Applicant's submissions that every late application causes prejudice as in this case the Respondent would lose a technical defence. It appears to the court however, that the possible prejudice is far greater to the Applicant than it would be to the Respondent. If the application for extension of time is granted, then the Respondent would suffer no hardship.

Whether the Claimant has a claim worthy of a grant of an extension of time

[31] I have also considered whether, "on a purely prima facie level", the Applicant has a claim with a real prospect of success. The Respondent has given credence to the prospect of success on the claim by the Applicant by admitting that the Applicant provided half of the deposit at the time of purchase of the property in question.

[32] There is also no dispute that the Applicant and the Respondent lived in the home, the subject of the claim being sought to be allowed to stand as filed, during the marriage and prior to their separation, and it would therefore, based on the definition in the PROSA, be the family home. It is also not in dispute that the property has since been registered in the name of the Respondent. The fact that it is registered solely in the name of the Respondent and is therefore legally her property and the Applicant is disputing the manner in which it came to be so registered, demonstrates that there are serious issues that need to be determined.

- [33] I am of the view that the Applicant has shown that he has a prima facie case to an interest in the property in question. He has shown, and this has also been indicated by Mrs Gavin, that they both bought the property and even on Mrs Gavin's evidence it has been shown that he contributed to the purchase price. I therefore find that even without praying in aid the provisions of PROSA, the Applicant has a prima facie claim to a share in the property.
- [34] I believe it is only fair and just for a potential claimant who has a claim with a real prospect of success not to be shut out from the courts to which he has turned for redress. Equally, however, it has been said that it is fair and just for a potential defendant to be able to rest with full knowledge that he or she will not be asked to answer to a claim which due to the passage of time she may not be able to adequately respond to. The circumstances of this case however show that it is not such that the Respondent would be prejudiced due to the passage of time, in putting forward a defence to the claim being sought to be filed, or that she would suffer prejudice, or more prejudice than the Applicant, if the extension of time is granted.
- [35] The exercise of the court's power is discretionary. Having carefully considered the circumstances under which permission may be granted, and although in this case the time limit for making a claim under PROSA has been exceeded, I find that this is a fit case in which the court should exercise its discretion in favour of the Applicant as there are serious issues to be tried, issues which will remain unresolved if the matter is not allowed to proceed. Further, the parties had been treating with the substantive issues in this claim and were even proceeding to trial prior to the procedural defects being noted and as such I am of the view that it should proceed to a full hearing so that there can be some finality.

Disposition:

[36] The application is therefore granted. The claimant is granted an extension of time to make an application under PROSA.

The FDCF and affidavit in support filed on July 18, 2014 are to stand as filed.

Costs to the Respondent (inclusive of costs of the adjournment on November 8, 2016) to be agreed or taxed.

A hearing of the FDCF is set for January 31, 2018 at 10:00 a.m..for one hour.

Leave to appeal is grante